

OCT 16 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6013

DATE COMPLAINT FILED: 05/16/08

LAST RESPONSE RECEIVED: 08/15/08

DATE OF NOTIFICATION: 05/22/08

DATE ACTIVATED: 07/17/08

EXPIRATION OF SOL: 3/31/2013

COMPLAINANT:

Democratic Congressional Campaign
Committee

RESPONDENTS:

Friends of Peter Teahen, and Jeffrey Elgin, in
his official capacity as treasurer
Teahen Funeral Home, Inc.
Peter Teahen

**RELEVANT STATUTES &
REGULATIONS:**

2 U.S.C. §434(b)
2 U.S.C. §441b
2 U.S.C. § 441a(a)(7)(B)
11 C.F.R. §109.21

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint alleges that House candidate Peter Teahen and his company, Teahen Funeral Home, Inc., coordinated company-financed television advertisements with Teahen's principal campaign committee, Friends of Peter Teahen, that featured Teahen and were aired within his Congressional district within 90 days of Iowa's primary election. The complaint further alleges that the resulting prohibited corporate contribution was knowing and willful.

1 Respondents deny that they violated the Act. They maintain that they complied with
2 FEC regulations because advertisements featuring Mr. Teahen were removed from the
3 airwaves within 45 days of the primary election, apparently misunderstanding the
4 applicable law. Response at 2-3. In support of their contention, Respondents cite to a
5 Federal Communications Commission regulation, 47 C.F.R. § 73.1492, that concerns the
6 lowest unit charge that broadcast stations must make available for candidate
7 advertisements during the 45 days preceding an election. *Id.* at 2. More generally,
8 Respondents maintain that the specific ad complained of was not intended to benefit
9 Teahen's campaign. They state that ad was created in 2001 and has been aired each
10 subsequent year "in early spring" prior to Memorial Day and Independence Day as a
11 tribute to veterans and their families as part of a company marketing strategy. They also
12 assert that the contracts to air and place the ad in 2008 occurred before Mr. Teahen
13 announced his candidacy.

14 Based on the available information, it appears that the advertisement at issue was
15 a prohibited coordinated communication pursuant to 11 C.F.R. § 109.21. Accordingly,
16 we recommend that the Commission find reason to believe that Respondents violated
17 2 U.S.C. § 441b and that the Committee also violated 2 U.S.C. § 434(b) in connection
18 with the advertisement.

19 **II. FACTUAL & LEGAL ANALYSIS**

20
21 **A. Facts**

22 According to public records, Peter Teahen is the President and a director of
23 Teahen Funeral Home, Inc. Teahen sought the Republican nomination for the House seat
24 in Iowa's 2nd Congressional District and filed a Statement of Candidacy with the
25

1 Commission on February 19, 2008. On or before March 31, 2008, Teahen Funeral
2 Home, Inc. began running a television advertisement that aired in the 2nd Congressional
3 District. Complaint at 1. The text of the ad, narrated by Teahen, follows:

4 My father served in the Navy and like many veterans he didn't talk
5 about his military experience. But we all knew how much he
6 loved his country. Dad had a big flag pole in our front yard and I
7 used to help him raise the flag. Now, when I see a flag, I think of
8 Dad and all the men and women who sacrifice their lives for the
9 sake of freedom. I'm Peter Teahen and I'm proud to be an
10 American. Teahen Funeral Home: Life ends, but memories live
11 on.

12
13 *Id.* at 1-2. *See also*, James Q. Lynch, *Dems Allege Teahen Campaign Violation*, The
14 Gazette (Cedar Rapids)(May 23, 2008), available at 2008 WLNR 9788607 (hereafter,
15 *Dems Allege*).

16
17 The ad (hereafter referred to as *Proud American*) apparently featured images of
18 Teahen and the American flag. A full screen image of Teahen appeared as Teahen stated,
19 "I'm Peter Teahen and I'm proud to be an American."¹ Complaint at 1-2. Although the
20 complaint and response suggest there was more than one television advertisement and the
21 *Dems Allege* newspaper article also references radio ads, the complaint provided a
22 transcript of only *Proud American* and does not mention radio ads. *See* Complaint at 1
23 ("[t]he transcript of *one* of the television advertisements . . . is as follows") and Response
24 at 2 ("[a]ll advertisements for Teahen Funeral Home featuring Mr. Teahen, his image
25 voice and/or likeness were removed on April 15th . . .") [emphases added.]

26 Respondents state that *Proud American* was removed sometime between April
27 15-17, 47 and 49 days, respectively, before Iowa's June 3rd primary election, apparently

¹ Respondents deny that the ad contained *multiple* images of Teahen and the American flag. Response at 2. Neither the complainant nor the respondents provided a videotape of the ad, and we were unable to locate a copy using publicly-available resources.

1 based on a cable provider's advice that the ads had to be removed 47 days prior to the
2 primary to comply with FEC regulations.² Response at 2-3. The funeral home continued
3 to air advertisements afterwards that featured Teahen's daughter rather than Teahen's
4 image, voice or likeness. Response at 2; *Dems Allege, supra*.

5 **B. Analysis**

6 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits
7 corporations from making a contribution or expenditure in connection with any election
8 to any political office and corporate offices from consenting to such contribution.
9 2 U.S.C. § 441b(a). Moreover, federal candidates and political committees may not
10 knowingly accept or receive such contributions. *Id.* A contribution includes a gift,
11 subscription, loan, advance or deposit of money or anything of value made by any person
12 for the purpose of influencing a Federal election. 2 U.S.C. §431(8)(A)(i). The term,
13 "anything of value," includes in-kind contributions. 11 C.F.R. § 100.52(d)(1).

14 The Act defines in-kind contributions as, *inter alia*, "expenditures made by any
15 person in cooperation, consultation, or concert, with, or at the request or suggestion of, a
16 candidate, his authorized political committee, or their agents." 2 U.S.C.
17 §441a(a)(7)(B)(i). Pursuant to 11 C.F.R. §109.21, a communication is coordinated if it:
18 (1) is paid for by a person other than the candidate or candidate's committee; (2) satisfies
19 one or more of the four content standards set forth in 11 C.F.R. §109.21(c); and
20 (3) satisfies one or more of the six conduct standards set forth in 11 C.F.R. §109.21(d).

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² The response states that the ad was removed on April 15th, "47 days before" the primary; however, April 15th was 49 days before the primary. In addition, the complaint, dated May 2, 2008, alleges that the ad "is currently airing."

1 1. ***Proud American* Appears to Meet the Payment Prong of**
2 **11 C.F.R. § 109.21**
3

4 Respondents implicitly admit that Teahen Funeral Home paid for *Proud American*
5 in stating that the ad was created for the funeral home in 2001. The ad also ends with a
6 tagline referencing the funeral home. Thus, the ad appears to meets the first prong of the
7 coordination requirement in that it was apparently paid for by a person other than the
8 candidate or candidate's committee.

9 2. ***Proud American* Meets the Content Prong of**
10 **11 C.F.R. § 109.21**
11

12 A communication satisfies the content prong of the coordinated communication
13 regulations if it meets one of four content standards, including a communication that is a
14 public communication that refers to a clearly identified candidate, is disseminated within
15 90 days of a primary election, and is targeted to voters in the jurisdiction of the identified
16 candidate. See 11 C.F.R. § 109.21(c)(1) and (4).³

17 *Proud American* was aired within the 2nd Congressional District between 47 and
18 67 days before the primary. According to the complaint and response, it featured
19 Teahen's image and voice. Therefore, *Proud American* is a public communication that

³ The Commission revised 11 C.F.R. § 109.21, effective July 10, 2006, following an appellate court decision that invalidated the fourth, or "public communication" content standard at 11 C.F.R. § 109.21(c)(4). *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. F.E.C.*, 508 F. Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the 90- and 120-day time frames in the "public communication" content standard. See *Shays v. F.E.C.*, ___ F.3d ___, (D.C. Cir. 2008). This decision does not impact this matter, however. Because the regulation was found invalid for being too permissive, there is no problem relying upon the parts of the regulation that were not called into question in the court's decision.

1 satisfies the content prong set forth in 11 C.F.R. § 109.21(c)(4). See 11 C.F.R. § 100.26
2 (Public communication includes communication through broadcast or cable).

3 Respondents essentially argue that *Proud American* was a business advertisement
4 rather than an “expenditure” because it was made to promote Teahen’s business and not
5 to influence Teahen’s election. In promulgating Section 109.21(c)(4), however, the
6 Commission emphasized that the provision was a “bright line rule” meant to “focus[] as
7 much as possible on the face of the public communication” to minimize “characterization
8 of the meaning or the content of communication, or inquiry into the subjective effect of
9 the communication on the . . . viewer . . .” Explanation and Justification, *Coordinated*
10 *and Independent Expenditures*, 68 Fed. Reg. 421, 430 (Jan 3, 2003)(*Coordination E&J*).
11 The Commission specifically rejected the view that it must first determine whether or not
12 a payment for a communication was an “expenditure” before proceeding to a
13 coordination analysis, and instead determined that a payment that satisfied the content
14 and conduct standards of 11 C.F.R. § 109.21 satisfied the statutory requirements for an
15 “expenditure” under 2 U.S.C. § 441a(a)(7)(B)(i). *Coordination E&J* at 427.

16 In addition, the Commission confirmed that the “bright-line test” affords no
17 “commercial exemption” to the Section 109.21(c)(4) content standard in MURs 5410
18 (Oberweis) and 5517 (Stork). As in this matter, both MUR 5410 and 5517 involved
19 advertisements financed by the candidates’ businesses that featured the respective
20 candidates ostensibly promoting their businesses without reference to elections, voting or
21 their candidacies. Most recently, in *Stork*, the Commission found probable cause to
22 believe that television advertisements that featured Stork inviting viewers to his family-
23 owned bakery “to find out why [the bakery] means quality you can trust” were

1 coordinated communications under 11 C.F.R. § 109.21(c)(4). In making its probable
2 cause findings, the Commission adhered to the bright-line test in rejecting Respondents'
3 argument that the ads were exclusively business advertisements intended to coincide with
4 the opening of a new bakery. *See* MUR 5517 General Counsel's Report #2 at pp. 8-11.]
5 Similarly, in *Oberweis*, the Commission accepted a conciliation agreement that included
6 admissions of Section 441b violations by the candidate, his company and his committee
7 for a coordinated advertisement that met the Section 109.21(c)(4) content standard. *See*
8 MUR 5410 Conciliation Agreement. The Oberweis advertisement featured the candidate
9 making breakfast for a pair of his company's home delivery customers and identified him
10 by name as chairman of the company. *Id.*

11 Subsequent to the Commission's November 14, 2007 probable cause finding in
12 *Stork*, the Commission amended its regulations applicable to electioneering
13 communications in response to the Supreme Court's decision in *FEC v. Wisconsin Right*
14 *to Life, Inc.*, (127 S. Ct. 2652 (2007)(*WRTL*)) by creating a "business advertisement" safe
15 harbor that would allow corporations and unions to finance electioneering
16 communications that meet certain conditions. *See* Explanation and Justification,
17 *Electioneering Communications*, 72 Fed. Reg. 72899 (Dec. 26, 2007)(*EC E&J*);
18 11 C.F.R. § 114.15(b). The Commission expressly stated in the *EC E&J* that
19 electioneering communications that satisfy the "business advertisement" safe harbor may
20 nevertheless be subject to the coordination regulations. *EC E&J* at 72905, fn. 7.

1 Under the EC "business advertisement" safe harbor, a corporation may
2 permissibly make an electioneering communication if it: (1) does not mention any
3 election, candidacy, political party, opposing candidate, or voting by the general public;
4 (2) does not take a position on a candidate's character, qualification, or fitness for office;
5 and (3) proposes a commercial transaction such as purchase of a book, video or other
6 product or service. 11 C.F.R. § 114.15(b)(1), (2) and (3)(ii). In considering whether a
7 communication qualifies for the safe harbor, the Commission may consider only the
8 communication itself and basic background information to put the communication in
9 context. Such background information must be established with minimal or little
10 discovery. 11 C.F.R. § 114.15(d).

11 The *EC E&J* provides an example of an ad that the Commission believed would
12 qualify for the safe harbor that featured a business that bore the candidate's name, "Joe
13 Smith Cadillac." *EC E&J* at 72907-72908. The ad focused on the products sold and the
14 dealership's reputation for customer service and as a sales leader. The ad also invited the
15 audience to visit the business and included its location. In concluding that the "Joe Smith
16 Cadillac" ad qualified for the business ad safe harbor, the *EC E&J* observed that the ad
17 mentioned no election, candidate or voting; took no position on the candidate's character,
18 qualifications or fitness; and proposed a commercial transaction by advertising the
19 business owned by the candidate and invited viewers to purchase the products sold there.
20 *Id.* at 72908. Notably, the candidate did not appear in the ad.

21 Even though the Commission has not revised its coordination regulations at
22 section 109.21(c)(4) to include the same "business advertisement" safe harbor for ECs or
23 public communications that otherwise meet the content standard, it appears that *Proud*

1 *American* would not qualify for the safe harbor because it does not propose a commercial
2 transaction.⁵ Admittedly, the funeral home industry may market itself differently than a
3 typical service industry, and according to Respondents, it has used the ad in the past as
4 part of its marketing strategy. *Proud American* also touts the candidate's character,
5 qualifications, and fitness for office, as it highlights his patriotism in the phrase "I'm
6 proud to be an American." Those facts coupled with the "easily discoverable" external
7 facts that the ads ran a little more than a month after he filed his statement of candidacy
8 and almost two months before Memorial Day, would disqualify *Proud American* from
9 meeting the "business advertisement" safe harbor, even assuming that standard should be
10 transported from the EC regulations and applied in this situation.

11 3. *Proud American* Appears to Meet the Conduct Prong of
12 11 C.F.R. § 109.21(c)
13

14 The "conduct" prong is the third and final prong necessary for a communication
15 to be deemed coordinated. Communications that meet the conduct prong include those
16 where the candidate or candidate's agent is materially involved in certain decisions
17 regarding the communication, including the communication's content, the means or mode
18 of the communication, the specific media outlets to be used, and the timing or frequency
19 of the communication.

20 The candidate's appearance in an advertisement was sufficient by itself to satisfy
21 the "material involvement" conduct standard in both MURs 5410 and 5517. Both matters

⁵ Not only is there an absence of any language specifying what products or services the funeral home might provide to consumers, but based on the transcript of *Proud American* provided by complainant, the ad apparently contained no information about the funeral home's location or contact information for inquiring into its services. As noted above, the "Joe Smith Cadillac" ad contained the location of the dealership. The advertisements at issue in MURs 5410 and 5517, which aired long before the new EC regulations were promulgated, included respectively, a phone number for the company's home delivery service and the business's general location and hours. The Commission found them to be coordinated communications notwithstanding the fact that such information lent support to the business nature of those ads.

1 relied on Commission Advisory Opinion 2003-25 (Weinzapfel). In that AO, the
2 Commission considered whether an advertisement for a local candidate featuring an
3 endorsement by a U.S. Senator running for re-election constituted a coordinated
4 communication under Section 109.21 and concluded that it did. In addressing the
5 "material involvement" conduct standard, the Commission stated that it was highly
6 implausible that a Federal candidate would appear in an advertisement without being
7 involved in one or more of the listed decisions in Section 109.21(d)(2).⁶

8 Because Respondents represent that *Proud American* was an advertisement
9 created in 2001, Teahen's involvement in decisions about the content of the ad have no
10 bearing on the coordination analysis since he was not then a candidate. The timing and
11 placement of the ad may be another matter. The response somewhat vaguely states that
12 the ad had been "used" since 2001 "in early spring prior to Memorial Day . . . to promote
13 patriotism and service to country." According to complainant, the ad began running "on
14 or before" March 31. That timing, almost two months before Memorial Day (May 26,
15 2008), seems somewhat premature for an ad supposedly tied to Memorial Day.
16 Moreover, Respondents apparently decided to air the ad that was normally aired "prior to
17 Memorial Day" after having been advised by a cable provider that they would have to
18 remove it by April 17th, assertedly to comply with "FEC" regulations, more than five
19 weeks before Memorial Day, even though it appears they had other ads that did not
20 feature Mr. Teahen, his image, voice or likeness. *Id.* at 2-3. These facts suggest that
21 Respondents may have believed the ad could be valuable to the campaign, the hallmark

⁶ Advisory Opinion 2003-25 was superseded to the extent that the Commission amended the coordinated communication regulations in 2006 to create a safe harbor that permits a Federal candidate to endorse other candidates in an advertisement unless the ad promotes, supports, attacks, or opposes the endorsing candidate or his or her opponent.

1 of a coordinated contribution, particularly to the extent that the late-March broadcast of
2 the ad broke with the funeral home's prior practice. These facts also suggest that
3 although Respondents misstated or misinterpreted the applicable law, the Respondents
4 realized that there were electoral implications to a candidate running an ad featuring
5 himself in close proximity to an election. We believe these facts are sufficient to support
6 an investigation into whether Mr. Teahen was materially involved in decisions regarding
7 the advertisement.

8 Based on the above, we recommend that the Commission find reason to believe
9 that Teahan Funeral Home, Inc. violated 2 U.S.C. § 441b by making prohibited in-kind
10 corporate contributions in the form of coordinated communications to Friends of Peter
11 Teahen and Jeffrey Elgin, in his official capacity as treasurer ("the Committee"); that the
12 Committee violated 2 U.S.C. § 441b by knowingly accepting prohibited in-kind corporate
13 contributions from Teahan Funeral Home; and that Peter Teahen violated 2 U.S.C.
14 § 441b by consenting to the making of a prohibited in-kind corporate contribution as an
15 officer and director of Teahan Funeral Home, Inc.⁷ In addition we recommend that the
16 Commission find reason to believe that the Committee violated 2 U.S.C. § 434b by
17 failing to report the resulting in-kind contribution. See 11 C.F.R. § 109.21(b)(1) and (3).

⁷ The complaint alleges that the candidate knowingly and willfully violated the Act but it provided no factual basis to support the knowing and willful nature of any violation. Based on the available information, a knowing and willful recommendation is not warranted.

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Accordingly, we request that

the Commission authorize the use of compulsory process in this matter.

IV. RECOMMENDATIONS

1. Find reason to believe that Teahen Funeral Home, Inc. violated 2 U.S.C. §441b.
2. Find reason to believe that Friends of Peter Teahen, and Jeffrey Elgin, as treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b).
3. Find reason to believe that Peter Teahen violated 2 U.S.C. §441b(a).
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Authorize the use of compulsory process in this matter, including the

issuance of appropriate interrogatories, document subpoenas, and
deposition subpoenas.

Thomasenia P. Duncan
General Counsel

Date: October 15, 2008

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